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RANI
BRUNESH-
WARI
KUER
v.
MAHARAJ
KUMAR
GOPAL
SARAN
NARAYAN
SINGH.

appeal must be decreed and the decree of the Court below modified. The plaintiff is entitled to costs on the sum decreed in his favour throughout.

DAS, J.—I agree.

Appeal decreed.

APPELLATE CIVIL.

Before Das and Ross, JJ.

PANDIT DURGA MISSIR

v.

BALJNATH SARAN.*

Mortgage—mortgagee paying off prior mortgage, whether entitled to priority—intention to give first charge to mortgagee sufficient—keeping alive prior mortgage, question as to, whether material.

In order that a subsequent mortgagee, who has paid off a prior mortgage, should have priority over the rest, it is sufficient to show that the parties intended that the mortgagee should have the first and only charge, and it is immaterial whether there was any intention to keep alive the prior mortgage.

Dinobundhu Shaw Chowdhry v. Jogmaya Dasi (1), followed.

Mohesh Lal v. Mohant Baican Das (2), distinguished.

Adams v. Angell (3), referred to.

Appeal by the defendant no. 6.

The facts of the case material to this report are stated in the judgment of Das, J.

*Appeal from Appellate Decree no. 918 of 1926, from a decision of J. Chattarji, Esq., Additional District Judge of Shahabad, dated the 5th of February, 1926, reversing a decision of Babu Tulsidas Mukharji, Subordinate Judge of Arrah, dated the 29th of May, 1924.

(1) (1902) I. L. R. 29 Cal. 154, P. C.

(2) (1883) I. L. R. 9 Cal. 961, P. C.

(3) (1877) L. R. 5 Ch. Div. 684.

Sambhu Saran, for the appellant.

S. M. Mullick and *B. P. Sinha*, for the respondents.

DAS, J.—In my opinion the view taken by the learned District Judge is substantially correct. The question he had to decide was whether the plaintiffs were entitled to priority in respect of Balgobind Tewari's mortgage, dated the 26th of July, 1906, which was admittedly paid off by the plaintiffs. The mortgage in favour of defendant no. 6. the appellant in this Court was executed on the 17th of January, 1908, whereas the mortgage in favour of the plaintiffs was executed on the 1st of March, 1909. It is obvious that defendant no. 6, is, on a consideration of the dates on which their respective mortgages were executed, entitled to priority unless it be held that the plaintiffs are entitled to priority on the ground that they satisfied an earlier mortgage in favour of Balgobind Tewari, which was executed on the 26th of July, 1906. The learned District Judge has held that the plaintiffs are entitled to priority and defendant no. 6 appeals to this Court.

Now it appears that the plaintiffs, though they were aware of the mortgage of the 26th of July, 1906, in favour of Balgobind Tewari, were not aware of the existence of the mortgage of the 17th of January, 1908, in favour of defendant no. 6. In fact the mortgage bond in favour of the plaintiffs recites that the mortgage in favour of Balgobind Tewari was to be paid off out of the money at once and that there was no encumbrance affecting the property other than that in favour of Balgobind Tewari which was to be paid off.

Mr. Sambhu Saran appearing on behalf of the appellant contends that, as the plaintiffs were not aware of the existence of the mortgage bond in their favour, there was no reason on their part for keeping alive the mortgage bond of the 26th of July, 1906;

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and he draws our attention to the decision of the Judicial Committee in *Mohesh Lal v. Mohant Bawan Das* (1). The facts in that case were as follows: One Mangal Das gave a mortgage of four different properties to the plaintiff to secure an advance made to him. Mangal Das purported to execute the mortgage as the owner of the properties. It appears that three of the properties in fact belonged to an asthal of which defendant no. 1 was the mahant, Mangal Das having been cited as defendant no. 2 in the action. It was not disputed that Mangal Das had for many years acted as the agent of the asthal. It was also not disputed that on the death of one of the mahants, Mangal Das put forward his claim as the successor of that mahant and that his claim having been disallowed, he put forward a title to the disputed properties as the absolute owner thereof. It was contended on behalf of the plaintiff that Mangal Das acted as the agent of the mahant in executing the mortgage and that consequently the mortgage was binding upon defendant no. 1 the mahant of the asthal in question. This contention failed in all the Courts. An alternative argument was then put forward on behalf of the plaintiff to the effect that though he had no claim upon the bond of the 12th of May, 1872, which was the bond he was seeking to enforce in that litigation, he could fall back upon an earlier bond, a bond of July, 1869, which Mangal Das executed as agent of the asthal in question in favour of one Lachmi Narain. It was found that the money borrowed on the bond of the 12th of May, 1872, went to discharge the bond of the 2nd of July, 1869; and the plaintiff claimed that he was entitled to be subrogated to the securities held by Lachmi Narain. Now in dealing with the contention, their Lordships pointed out that the question whether a mortgage paid off is kept alive or extinguished depended upon the intention of the parties

(1) (1883) I. L. R. 9 Cal. 561, P. C.

and they cited with approval the decision of the Master of the Rolls in *Adams v. Angell* (1), in support of their conclusion that if there was no reason for keeping alive a mortgage which is paid off, equity will, in the absence of any declaration of intention, destroy it, but that if there was any reason for keeping it alive, equity will not destroy it. But as I have pointed out, their Lordships pointedly referred to the fact that there was no intermediate mortgage between Lachmi Narain's mortgage and the mortgage to the plaintiff of 1872; and it was on this ground that they came to the conclusion that there was no reason on the part of the plaintiff for keeping alive Lachmi Narain's mortgage.

Mr. Sambhu Saran says that the decision of the Judicial Committee is directly in point and it makes no difference in this case that there was an intermediate mortgage, namely, the mortgage in favour of defendant no. 6, since it is admitted that the plaintiffs had no knowledge of the existence of that mortgage. The argument is an attractive one, but must fail on the decision of the Judicial Committee in a later case: *Dinobundhu Shaw Chowdhry v. Jogmaya Dasi* (2). The facts of that case were as follows: A certain person (we will call him A) executed two mortgages, one in favour of Lokenath on the 22nd of June, 1888, and the other in favour of Sarat on the 9th of August, 1890. Subsequently on the 7th of October, 1891, he executed a mortgage in favour of one Radhajiban Mustaffi for the express purpose of paying off the two earlier mortgages. It was recited in the mortgage of the 7th of October, 1891, that the mortgage was executed to pay off the earlier mortgages and that there was no encumbrance or attachment affecting the property which was being mortgaged to Radhajiban. But in fact on the 5th of October, 1891, that is to say, only two days before the mortgage in favour of Radhajiban, the mortgaged

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(1) (1877) L. R. 5 Ch. D. 634. (2) (1902) I. L. R. 29 Cal. 154, P. C.

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property was attached at the instance of one Priyomath who appears to have had a money decree against A. The property was in due course put up for sale and on the 28th of July, 1892, Dinobundhu purchased the property at the execution sale; and the question arose whether Radhajian was entitled to priority over Dinobundhu. Now if the two earlier mortgages were out of the way, it could not be disputed that Dinobundhu was entitled to priority. But if on the other hand the earlier mortgages were in existence, then Radhajian, standing in the shoes of the earlier mortgagees, could successfully claim priority over Dinobundhu. It must be remembered that so far as Radhajian was concerned, he had no knowledge that two days before his own mortgage the property had in fact been attached in execution of a money decree, so that it might reasonably be argued that there was no reason on the part of Radhajian for keeping alive the two earlier mortgage bonds. But their Lordships came to the conclusion that it was the intention of the parties to the transaction to give to Radhajian a charge on the property in question in priority to all other charges, if any; and they arrived at this conclusion on the recital in the mortgage bond that the property was not subject to any prior encumbrances or attachment. The relevant portion of the judgment of the Judicial Committee ought to be set out in full as it completely meets the argument of Mr. Sambhu Saran. That passage runs as follows:

“Pausing here for a moment, nothing can be clearer than that the intention of the parties to this transaction was to give to Mustaffi a charge for 40,000 rupees on the property in question in priority to all other charges, if any. The property being represented as unincumbered the statement in the judgment of the High Court that it was intended to keep the two old mortgages alive is open to criticism. But it does not affect the substance of the case. The

respondents were intended to have the first and only charge, and it is idle to contend that there was any intention to extinguish the old mortgages for the benefit of the execution creditor or any purchaser at the sheriff's sale."

Now employing the argument which found favour with the Judicial Committee in the case to which I have referred, I may say that it is utterly immaterial to consider the question whether it was intended to keep the old mortgages alive; and it is sufficient to say that, as it was the intention of the parties that the plaintiffs should have the first and only charge, it would be idle to contend that there was any intention to extinguish the mortgage of the 26th of July, 1906, that is to say, the mortgage in favour of Balgobind Tewari, for the benefit of defendant No. 6. I hold therefore that the plaintiffs are entitled to priority to the extent of the sum of money which they employed to discharge the bond of the 26th of July, 1906. In order to ascertain the extent of this priority, interest will have to be calculated on the bond of the 26th of July, 1906, at the rate of 18 per cent. per annum with annual rests up to the 1st of March, 1909 and, thereafter, interest must be calculated at the rate of 12 per cent. per annum with yearly rests, which is the rate of interest provided for in the plaintiff's bond. We are informed that the plaintiffs paid the sum of Rs. 1,830 to satisfy the bond of Balgobind Tewari. They are therefore entitled to priority in respect of the sum of Rs. 1,830 with interest thereon at 12 per cent. per annum with annual rests. It must also be made clear that the plaintiffs' priority extends to the properties covered by the bond in favour of Balgobind Tewari and that it extends no further than those properties.

The appeal must be dismissed with costs.

Ross, J.—I agree.

Appeal dismissed.

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